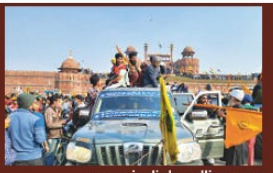
Political Toolkit: Activism as terrorism

Domino Effect: Farmers' protests lead to a slew of lawsuits



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INDIA LEGAL

March 1, 2021 ₹100

STORIES THAT COUNT

Act of God

A High Court judge's masterly interpretation of contract law in Covid-19 times shows the way in which judicial interpretation can befriend justice, writes Prof Upendra Baxi

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SEDITION: SUPREME COURT VIEW

Inderjit Badhwar

DESPITE the hue and cry that reverberates about the validity and legitimacy of sedition laws whenever the government machinery leans heavily on them as a tool for the suppression of dissent, I doubt that notwithstanding their misuse for gagging free speech, they will ever be stricken from the books.

This is because governments, no matter how loudly they may scream when their parties are in the opposition, invoke and use draconian rules to deter challenges to their authority when they are in power. And the courts, while interfering in *habeas corpus* matters and protected speech, will rarely overturn or revoke laws and legislation even if they border on the infringement of civil liberties.

Courts are generally conservative. They believe such matters are in the purview of the legislature. You may argue with this, but this doctrine falls within what is known as "strict constructionism".

And so it goes with prosecution under Section 124A (sedition) of the Indian Penal Code. This sedition law, under which Gandhi and his freedom fighters were repeatedly jailed, has been reviled and condemned as anachronistic and an imperialist hand-me-down. It has also been challenged in court. But it still flourishes. And it is once again in the news because the government has used it as a handy legal weapon against many of its critics, including climate activist Disha Ravi, supporting anti-government protests such as the farmers' agitation.

The sedition law, under which Gandhi and his freedom fighters were jailed, has been reviled and condemned as anachronistic and an imperialist hand-me-down. It has also been challenged in court. But it still flourishes.

I doubt that the Supreme Court will budge from the stand it has already espoused on the sedition issue. It last surfaced in 2016. Newspaper headlines suggested that the apex court had taken a massive leap forward in granting relief to some petitioners seeking to unshackle India from the sedition law.

Actually, the judges—Dipak Misra and Uday Umesh Lalit—declined to deal with four specific reliefs sought by the petitioner—and chose to reiterate the larger principles of law laid down by a Constitution Bench of the Supreme Court in 1962.

In summary, the petition sought that police officers receiving a complaint under the sedition section shall not register an FIR before obtaining the written consent of the Director General or Commissioner of Police.

The petitioners argued that the law of sedition was made by the British and was used against freedom fighters, and that the wording of Section 124A is such that it is often misused and FIRs are registered rampantly.

The petitioners asked the court:

"a. Issue an appropriate writ making it mandatory for the concerned authority to produce a reasoned order from the Director General of Police (DGP) or the Commissioner of Police, as the case may be, certifying that the 'seditious act' either led to the incitement of violence or had the tendency or the intention to create public disorder, before any FIR is filed or any arrest is made on the charges of sedition against any individual.

"b. Issue an appropriate writ directing the Ld. Magistrate to state in the order taking cognizance certifying that the 'seditious act' either led to the incitement of violence or had the tendency or the intention to create public disorder in cases where a private complaint alleging sedition is made

before the Ld. Magistrate.
"c. Issue an appropriate writ directing for a review of pending cases of sedition in various courts to produce an order from the DG or Commissioner of Police, as the case may be, certifying that the 'seditious act' either led to the incitement of violence or had the tendency or the intention to create public disorder in cases.
"d. Issue an appropriate writ directing that investigations and prosecutions must be dropped in cases where such a reasoned order as prayed for in Prayers (a), (b) and (c) is not provided and the act in question involved peaceful expression or assembly."

It is mystifying why the petitioners, if they did not believe in the fairness or the validity of the Section itself, chose not to challenge its very constitutionality rather than attempting to reinvent a wheel already set in motion by the Supreme Court itself in 1962 in the *Kedar Nath Singh vs State Of Bihar*.

It unambiguously states:
"It is well settled that if certain provisions of law construed in one way would make them consistent with the Constitution, and another interpretation would render them unconstitutional, the Court would lean in favour of the former construction. The provisions of the sections read as a whole, along with the explanations, make it reasonably clear that the sections aim at rendering penal only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resort to violence. As already pointed out, the explanations appended to the main body of the section make it clear that criticism of public measures or comment on Government action, however strongly worded, would be within reasonable limits and would be consistent with the fundamental right of freedom of speech and expression. It is only when the words, written or spoken, etc. which have the pernicious tendency or intention of creating public disorder or disturbance of law and order that the law steps in to prevent such activities in the interest of public order. So construed, the section, in our opinion, strikes the correct balance between individual fundamental rights and the interest of public order. It is also well settled that in interpreting an enactment the Court should have regard not merely to the literal meaning of the words used, but also take into consideration the antecedent history of the legislation, its purpose and the mischief it seeks to suppress....Hence, these provisions would not exceed the bounds of reasonable restrictions on the right of freedom of speech and expression. It is clear, therefore, that cl. (2) of Art. 19 clearly saves the section from the vice of unconstitutionality."

CLEAR STAND
While dealing with sedition laws in 2016, Justices Dipak Misra (above left) and Uday Umesh Lalit of the SC reiterated the larger principles of law laid down by a Constitution bench of the Court in 1962

As of now, that's the way it is. Justices Misra and Lalit refused to interfere in any manner except by reiterating that the authorities while dealing with cases under Section 124A of IPC would do so guided by the principles laid down in Kedar Nath's case. After hearing the arguments from both sides, the judges observed:

- The Supreme Court cannot make amendments in CrPC as sought by the petitioner.
- The police officer is competent to know the law laid down by the Supreme Court.
- There was the remedy of quashing the FIR under Section 482 CrPC and hence, interference by the Court was not warranted.

Finally, the Court held that there was no need for interference by the Court and stated that the law laid down by the Constitution bench in *Kedar Nath Singh vs UOI* shall be followed. Curiously, the Court denied the petitioners' request that the order shall be communicated to the chief secretaries of the states.

The Court concluded: "We are of the considered opinion that the authorities while dealing with the offenses under Section 124A of the IPC shall be guided by the principles laid down by the Constitution Bench in *Kedar Nath Singh vs State of Bihar (1962)*. Except saying so, we do not intend to deal with any other issues as we are of the considered opinion that it is not necessary to do so."

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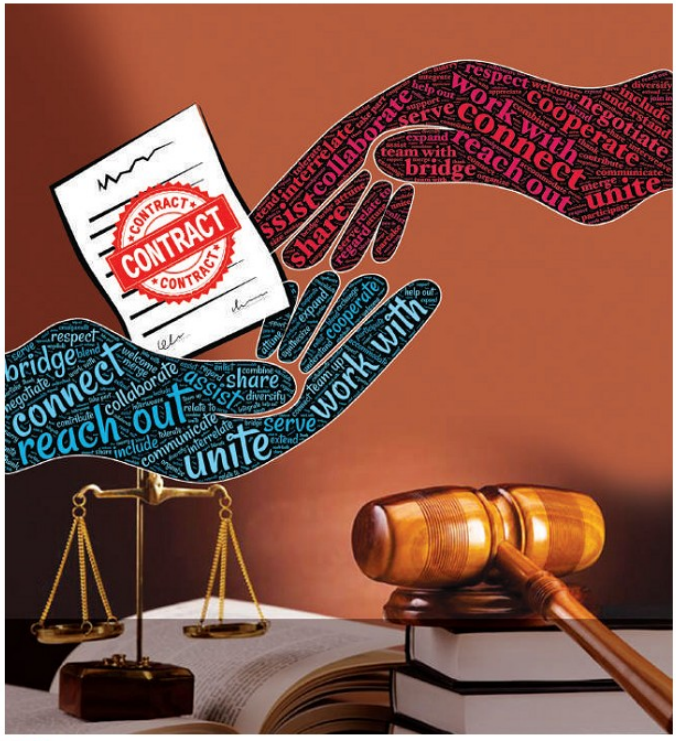

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The job of teachers in the lives of their students can be profound. Like French philosopher Albert Camus, I too had kind, thoughtful and morally upright teachers whose influence guided me in my legal profession, writes **Justice (retd) Kamaljit Singh Garewal**

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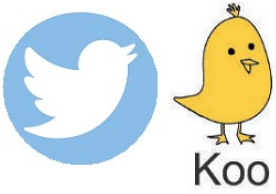

After foreign tweets on Indian developments led to controversy, the government has reacted to Twitter on Koo, a home-grown micro-blogging site. Having two platforms will cool down passions

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Google's deals with several news organisations to pay for exclusive content could set a precedent and open a Pandora's Box of payment demands. This has the potential to change the dynamics of internet business models

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While the centre's plan to establish a Rs 20,000-crore DFI for infrastructure projects is an old idea, its success will depend on transparency and accountability and its engagement with stakeholders

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Priya Ramani acquitted in MJ Akbar's defamation case

The latest ruling by the Delhi court in the *Priya Ramani vs MJ Akbar* case has given a sense of empowerment to women in India. The Delhi trial court acquitted journalist Priya Ramani (right) in a criminal defamation case filed by former Union minister MJ Akbar (extreme right).

Akbar had filed the case against Ramani after she accused him of sexual harassment. In his order ACM Ravindra Kumar Pandey said: "The right of reputation cannot be protected at the cost of the right of life and dignity of woman." The court ruling in the case provided legal protection to women speaking up against sexual harassment.

Siddique Kappan gets five-day bail

Kerala-based journalist Siddique Kappan (left), who was arrested on his way to Hathras where a young Dalit woman had died after being allegedly gangraped, was granted bail to visit his ailing mother for five days. The Supreme Court directed Kappan to not give interviews to any media platform, including social media, during the duration of his bail.

Kappan was arrested along with three others by the Uttar Pradesh Police in October last year. The three-judge bench headed by Chief Justice of India SA Bobde also questioned the counsel for the Kerala Union of Working Journalists as to why it did not approach the Allahabad High Court in the beginning.

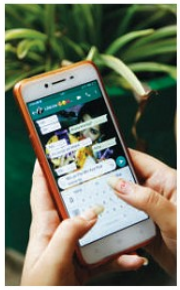
Siddique Kappan and three other people—Atikur Rahman, Masud Ahmed and Mohammad Alam—were detained on October 5 for their alleged links with PFI and SFI.

SC to WhatsApp: It's our duty to protect people's privacy

The Supreme Court issued notice to social media firm Facebook and its subsidiary WhatsApp and made it very clear that it will have to intervene to protect people's privacy, which had become a major concern after the latter introduced its new privacy policy.

The apex court sought WhatsApp's response after a petition was filed seeking a stay on the new privacy policy of the instant messaging app. The bench headed by Chief Justice of India SA Bobde was hearing a plea filed by two college students, Karmanya Singh Sareen and Shreya Sethi.

The Court said: "You (Facebook and WhatsApp) may be two or three trillion (dollar) company. But people value their privacy. It is our duty and we have to protect people's privacy. People have great apprehension over loss of privacy."



SC issues notice to CEC in contempt plea

The Supreme Court issued notice to Chief Election Commissioner (CEC) Sunil Arora and leaders of prominent political parties on a contempt petition underlining their alleged failure to publish criminal antecedents of candidates who contested the Bihar assembly polls held last year. The three-judge bench of Justices RF Nariman, Hemant Gupta and BR Gavai issued the notice after a plea was filed by Advocate Brajesh Singh, who contended that the respondents were recalcitrant to the Court's direction issued in February 2020 regarding such publication.

The order asked all political parties to publish the details of criminal antecedents of their candidates in the Lok Sabha and assembly polls within 48 hours of selection of a candidate or within two weeks of nomination, whichever was earlier.

In addition to the CEC, notices were also issued to chief electoral officer for Bihar HR Srinivas, JD(U) leader KC Tyagi, RJD's Jagdanand Singh, LJP's Abdul Khalik, Congress's RS Surjewala and BJP's BL Santosh.

The case will now be heard on March 9.

Shabnam will be the first woman to be hanged since Independence

There has been a lot of debate between those advocating the death penalty and those who oppose it. In India, past precedents show that the death penalty is awarded in the rarest of rare cases.

Uttar Pradesh's Shabnam (below) is likely to be the first woman to be hanged in the country since Independence. Shabnam, with the help of her lover, had murdered seven of her family members in April 2008. The woman is likely to be hanged in the Mathura district jail. The date of the execution is yet to be decided, as her death warrant has not been issued.

Reportedly, Meerut's Pawan Jallad, who also carried out the execution of the men convicted in the 2012 Delhi gangrape case (Nirbhaya) has visited the Mathura Jail twice in the past few months.

The district court had sentenced the lovers to death. Subsequently, the district court's judgment was upheld by the high court and the Supreme Court. Shabnam then filed a mercy petition before former President Pranab Mukherjee which was rejected.

Those against the death penalty believe that it violates a citizen's fundamental right, the right to life enshrined in Article 21 of the Constitution.

Deep Sidhu to stay in police custody

A Delhi court extended by seven days the police custody of actor-turned-singer Deep Sidhu in connection with the Republic Day violence during the farmers' tractor rally against the centre's three new farm laws. Sidhu, arrested on February 9 and sent to custody for police interrogation, was produced before Metropolitan Magistrate Bhujali after the expiry of his police custody.

Delhi Police's Crime Branch is investigating if the violence was part of a larger conspiracy. Allegedly, Deep Sidhu was one of the main instigators of the violent incidents at the Red Fort.

Caste, religion-based labour banned in Rajasthan jails

In an unprecedented development, the Rajasthan government amended the state prison rules to do away with caste-based assignment of labour in jails. As per a notification issued by the state government earlier this month, the Rajasthan Prisons (Amendment) Rules, 2021, amended Rule 67 of Section II of Part 9, Rule 13 of Section I of Part 10 and Rule 27 of Section I of Part 15 [existing clause (d) stands deleted now] of Rajasthan Prisons Rules, 1951.

The amendments came after the Rajasthan High Court asked the state government to ensure that the jail inmates were not forced to indulge in menial jobs merely on the basis of their caste. Several media reports had thrown light on caste practices prevalent in prisons.

Previously, Rule 67 on "Cooking of Food" under Section 2 had said: "…any Brahmin or sufficiently high caste Hindu prisoner from this class is eligible for appointment as cook." Now, this line is among those removed. A new line which has been included under Rule 67 says: "No inmate shall be selected for cooking on the basis of his caste or religion."

The amended Rule 13 of Section I of Part 10 now states: "No tradesman shall be chosen on the basis of his caste or religion." The outgoing provision read: "Sweepers shall be chosen from among those who, by the custom of the district in which they reside or on account of their having adopted the profession, perform sweeper's work, when free."

Similarly, Clause (d) of Rule 27 of Section 1, Part 15, which included the definition of a habitual offender as "any member of a criminal tribe subject to the discretion of the Government," has also been deleted.

Amitava Sen

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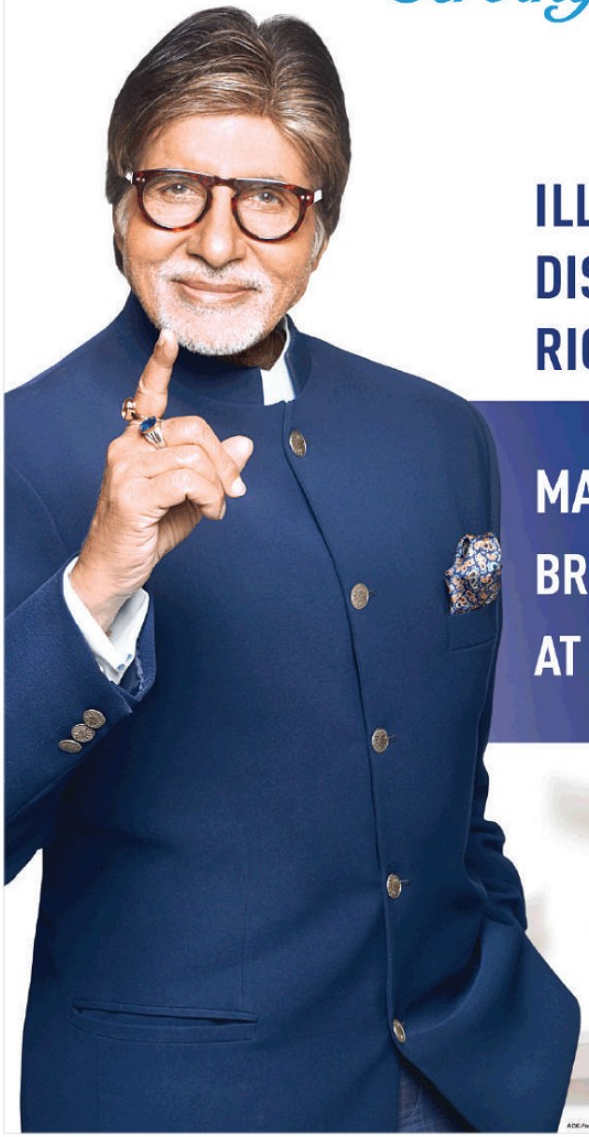

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NEPAL'S U-40 WOMEN INCAPABLE OF TRAVELLING ALONE?

(Courtsey: Kathmandu Post)

40 is too young for women

IN AN unprecedented move, the Nepal government is suggesting a new rule, asking women below 40 years to produce consent of family and permission from local ward for foreign travel. As per the government this is aimed to reduce trafficking of women and girl children. The rule has been met with a plethora of criticism from civil society, woman's rights defenders, and lawyers, calling it 'regressive'. Women have hit the roads of Kathmandu.

Women in Nepal also took to Twitter to express their angst against the new proposal, calling it "ridiculous" and "misogynistic." It is believed that instead of denying a woman her right to leave the country by bringing in a draconian law, the government should bring in better regulations and provide timely protection services when abuses occur.

KIWI PARLIAMENT UNTIES 'COLONIAL NOOSE'

FOR THOSE who do not wish to wear a necktie, the news about making a necktie optional for the legislatures in New Zealand has come as a big relief. It all started after a member of New Zealand's Parliament was expelled from the House for not wearing a tie. Speaker Trevor Mallard prevented Rawiri Waititi (a member of the Maori Party) from asking questions in the debating chamber and eventually ordered him to leave for not wearing a tie. Instead of a tie, Waititi (40) was wearing a taonga, which is a Maori greenstone pendant. Waititi described the clothing 'colonial noose' and said that compelling him to wear it was a violation of his rights and an attempt to suppress the indigenous culture. This episode sparked a debate over why a necktie was mandatory in the country's parliament.

Waititi was wearing a 'taonga'

Subsequently, after a meeting with the Standing Orders Committee, the Speaker Mallard said that he had decided to make ties optional in the House. Mallard said: "As Speaker, I am guided by the committee's discussion and decision, and therefore ties will no longer be considered essential."

WOMAN ALLEGES RAPE IN OZ PARLIAMENT

AUSTRALIAN PRIME MINISTER Scott Morrison has reportedly apologized to a woman who alleged she was raped in the country's parliament by an anonymous colleague, and promised a thorough probe into the government's workplace culture. The alleged rape was reported to the government in March 2019 by Brittany Higgins, then a 24-year old Liberal party adviser.

Higgins has alleged that a male colleague raped her in the office of Defence Minister Linda Reynolds by someone who also worked for Morrison's ruling Liberal party. Morrison called the allegation 'a wake-up call' for the treatment of women in the parliament.

DUBAI MOOTS A "SPACE COURT"

DUBAI IS exploring new possibilities to build its presence in the space sector and seems to be very fascinated with the idea of legalities beyond Earth. The country has announced the creation of a "space court" to settle commercial disputes that arise outside the purview of Earth.

The oil rich nation has invested heavily in this sector. In 2019 it sent to space its first astronaut and last year the country launched a probe named "Hope" towards Mars.

The tribunal is likely to be based in Dubai International Financial Center

The tribunal is likely to be based in Dubai International Financial Center (DIFC) Courts, an unbiased British-inspired arbitration based on common law. Space regulation is ruled by worldwide conventions and resolutions, together with the UN Outer Space Treaty which came into force in 1967. Several countries have also signed bilateral or multilateral agreements to regulate their activities in the space.

US SENATE ACQUITS TRUMP OF INCITING DEADLY CAPITOL RAMPAGE

THE US Senate has acquitted former US President Donald Trump of inciting the mob that stormed the Capitol last month, sparing him from conviction in his second impeachment trial in a year. Trump garnered widespread criticism for his alleged role in sparking the deadly siege.

The Senate voted 57-43 in favour of convicting Donald Trump, but fell short of the two-thirds majority or 67 senators needed to prove the charge, which held him responsible to incite the insurrection that left five people dead and forced lawmakers to flee in a bid to block certification of the November election.

The Party line and personal preferences differed. Senate Republican Leader Mitch McConnell voted "not guilty," but later was quoted as saying: "There is no question that President Trump is practically and morally responsible for provoking the events of the day…"

FLASHLIGHT SUPPORT FOR NAVALNY

RUSSIA IS witnessing a new protest format, with people coming out of their residences and shining their cell phone flashlights in a display of solidarity. This format was seen in support of imprisoned Russian opposition leader Alexei Navalny. This was a display of unity, despite efforts by Russian authorities to extinguish the illuminated protests.

Meanwhile, Navalny's allies have been accused of acting on NATO's instructions. Kremlin-backed TV channels warned that flashlight rallies were part of major uprising across the world, implying that this was shaping up to be the same. Various unnamed sources have been quoted as saying that a terrorist organisation has been plotting attacks during the mass protests.

Prof Upendra Baxi

An Act of God, No Doubt, But Which One?

An admirable judgment from the Madras High Court relieved a trader from paying license fee during the lockdown and focuses on the "impossibility" of performance of the contract and sees it under the scanner of Article 14

JUSTICE GR Swaminathan of the Madras High Court has written a beautiful judgment of which dear Justices Krishna Iyer and PN Bhagwati would have been proud of. Both would have appreciated his masterly interpretation of contract law in Covid-19 times and admired the ways in which judicial interpretation can befriend justice. They would have applauded his art as well as his craft. But I espy also wider implications of the discourse in the constitutionalising of the law of contract and the quiet reconstruction of the social contract that is the Constitution of India.

This is probably the first decision to adjudicate a contractual liability in Covid-19 times. The facts are, indeed, simple, though the arguments based on contract law are complex.

Nagercoil Municipal Corporation constructed a number of shops within the premises of the Vadaseri Christopher Bus

The decision has fashioned an implied term for the constitutional contract which rests on the pillars of just and fair cooperation between the people and the State.

Stand and licenses were brought for public tender cum auction sale on October 16, 2019. The petitioner successfully bid for Shop No 12A (Phase I) and was awarded a license for three years, commencing from November 1, 2019 on payment of Rs 1,15,000 towards monthly fee. The petitioner also paid Rs 13,80,000 towards refundable deposit and Rs 10 lakh towards security deposit. In other words, the Corporation had collected a year's license fee from the petitioner in advance.

However, a complete Covid-induced lockdown was in force from March 24, 2020 to September 6, 2020, enforced under the National Disaster Management Authority Act, 2005. Exercising its powers under Section 6(2) of the Act, an order (on March 24, 2020) directed "all the authorities to take effective measures to prevent the spread of the pandemic in the country".

The Tamil Nadu (the Health and Family Welfare Department) accordingly imposed restrictions. "As a result, Vadaseri Bus Stand and all the shops located within its premises came to be closed. The petitioner was prevented from accessing the shop. The business could not run". Yet, the question was whether the local body should grant total waiver of payment of license fee for the period from March 24, 2020 to September 6, 2020, and partial waiver for the subsequent period.

The government argued that the contractual obligation to pay the monthly license fee is "absolute" and "not excused by any supervening event". While it had, "considering the hardship experienced by the licensees", decided to "waive payment of lease/rental amount for the period of the general lockdown", it pleaded that "this Court cannot "travel beyond" the governmental decision. The learned Justice did, indeed, hold that the "relation between the parties is contractual in nature". And these govern the "rights of the parties".

But how far may "post-contract events" have a bearing on mutuality of intent between the parties to a contract? The Indian Contract Act, embodying the general principles of common law, recognises the doctrine of frustration. The principle of *force majeure* also operates when the agreement so stipulates.

As we know, this principle of absolute contract was enshrined in *Paradine* (1647), which crystallised the common law principle that an impossible supervening event will not necessarily discharge a party from its contractual obligations. This robust precedent held sway till *Taylor v Caldwell* (1863) made an exception for "contracts in which the performance depends on the continued existence of a given person or thing...". When it does, a condition is implied that the "impossibility of performance arising from the perishing of the person or thing shall excuse the performance". Section 56 of the Indian Contract Act, 1872, embodies the latter view and is clear on the point: a "contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promise or could not prevent, unlawful, becomes void when the act becomes impossible or unlawful".

Justices Krishna Iyer and PN Bhagwati would have been proud of Justice GR Swaminathan's (above) verdict. They would have appreciated his masterly interpretation of contract law.

Here, the contractual performance by the petitioner was made impossible by the national and state government's orders of general lockdown. It would also have been unlawful for any licensee to carry on the commerce or trade in violation of the lockdown orders. The genius of this decision lies in asserting an "implied term" of contract. The discourse here does not speak much to the Anglo-American decisions where the judiciary upheld parties' intentions despite any "hardships" and "difficulties" that judicial enforcement of contract may create. Rather, it focuses on the "impossibility" of performance when the contractual conduct itself becomes "unlawful". One hopes that the pandemic will ebb soon and never recur. Regardless, this decision is a potent reminder of judicial creativity and flexibility, too, for much less catastrophic contexts.

A civil law, principally the French law, counterpart is the doctrine of *force majeure* (or *vis major* in Latin), commonly known as an Act of God (FM, hereafter).The FM is considered similar, but not the same as the doctrine of frustration. It is similar in the sense that it deals with unforeseen supervening events, but different in that frustration entails destruction of the rationale or entire subject matter and parties stand permanently divested from their contractual obligations. However, the FM situation or clause allows this judicial flexibility, and civilian courts may even "re-write" contractual terms.[1]

Aside from the mere discourse of contract law, the Court also reasons from the first principles of the Indian constitutional law. Fairness (acting fairly and reasonably) is "a greater reason" too" because the "petitioner has contracted not with a private party but with Nagercoil Corporation" which is "a State instrumentality" and it would be "justified" to apply the "principles of reasonableness and fairness".

Applying prior decisions of the Supreme Court, the learned Justice also held that "the terms of the license must be interpreted under the scanner of Article 14 of the Constitution of India. What ▶

The High Court was hearing a plea filed by the petitioner, who was running a shop within the premises of the Vadaseri Christopher Bus Stand (above) in Nagarcoil, Tamil Nadu, and wanted the license fee waived for the total lockdown period.

applies to the landlord-tenant relationship when one party is State or its instrumentality, equally applies to the licensee-licensor relationship also". This constitutionalisation of contract law means that not only should the consideration for contract not be for an unlawful end or purpose, but it should not authorise unconstitutional consideration at least.

The happy surprises in this decision seem never to end. In the concluding paragraph, the Court summarises its order and directions. No licence fees for the period of total lockdown (from March 24, 2020 to September 6, 2020) may be levied from the licensee/ petitioner, who stands "totally relieved from the obligation to pay the license fee" and is entitled to "complete waiver". For the subsequent period of partial lockdown, the Court leaves it to the petitioner "to move the respondents for relief", but also adds that the state authorities may appositely resort to the "principle of nudging as propounded by Richard H.Thale".

The economic theory of nudging is new, but students of the judicial process in India know that suggestive jurisprudence is an inherent judicial power and process. It has been further consolidated by the foundation of social action litigation in India.[2] Here, too, the learned Justice in a short reference, makes the economic theory of nudging deeply relevant to the judicial process: the Court expects that the authorities will take note of the "ground realities and respond appropriately".

When we take leave of the law of contract and turn to the contexts of social contract theorising, we find the decision marks both a Lockean and Rousseau-like turn as well. If there is an implied term in contract law, by analogy there should be one for social contract. This is an implied term that many Justices explicitly developed with, and since, the *Kesavananda* (1973) discourse of the basic structure and essential features of the Constitution. The philosophically implied term of the social contract has thus been made explicit (by the general notion on juristic limits to power) and has introduced a creative scope for the notion of (as Yaniv Roznai calls this) "unconstitutional constitutional amendments".[3]

The "act of god" here is not necessarily a divine voice, but rather a set of voices of progressive judicial constitutional interpretation that erect, and constantly improvise, a basic structure and essential features' doctrine against the erasure altogether of the very idea of constitutionalism. Not for nothing have the apex justices been called the 'living oracles of law'.

This landmark decision has fashioned an implied term for the constitutional contract, which rests on the twin pillars of just and fair cooperation between the people and the State. ■

—The author is an internationally-renowned law scholar, an acclaimed teacher and a well-known writer

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[1] See for a fuller recent analysis, Peter J. Mazzacano,"Force Majeure, Impossibility, Frustration & the Like:Excuses for Non-Performance; the Historical Origins and Development of an Autonomous Commercial Norm in the CISG", *Nordic Journal of Commercial Law*, 2: 1-54 (2011). See also a practice note blog of Clifford Chance,'Coronavirus and Force Majeure', *https://www.cliffordchance.com/.../02/coronavirus-and-force-majeure.html*

[2] See, Upendra Baxi, '"Uprooting Injustice", "Organizing Negation: The Enduring Legacy of Justice Bhagwati' in M. C. Sharma (ed), *Law, Power, and Justice: Bhagwati' s Judicial Approach'*, 113- 132 (Delhi, Oak Bridge Press; 1999).

[3] Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*, (Oxford University Press, 2018). And see, Upendra Baxi, "A New Theory about Constituent Power?, *Indian Journal of Constitutional & Administrative Law*, 9-21 (2018).

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The Political Toolkit

The arrest of the 22-year-old climate change activist on charges of sedition has created global headlines and sparked protests. What exactly is this toolkit and what was her role in it?

By Neeraj Mishra

NO END TO INTERROGATION
A Delhi court sent Disha Ravi to three-day judicial custody on February 19

AT a time when there should be serious discussions on farm laws and welfare measures, the Indian government is obsessed with an obscure "toolkit" and the arrest of a 22-year-old climate change activist. If television news and Delhi police are to be believed, this toolkit is responsible for everything—from "stoking fires of Khalistan to the invasion of Red Fort to lowering the dignity of Indian state". The farmers' agitation which has claimed 200 lives is being scrubbed out of public memory.

In a well-configured strategy, the Delhi police latched on to the toolkit attached to Greta Thunberg's tweet early this month and started investigations. It zeroed down on toolkit makers—Disha Ravi of Bengaluru, Nikita Jacob, a Bombay-based lawyer, and Shantanu Muluk from Beed in Maharashtra. The connection: Fridays For Future, a global foundation started by Thunberg of which Ravi and others run the India chapter.

In hindsight, it was actually very easy to zero down on Ravi. Last year, she and her organisation Fridays for Future India were served notice under the UAPA and IT Act. They had been accused of running a terror outfit. The notice was withdrawn citing "inadvertent error" the same reason that the Supreme Court has given in the Rajdeep Sardesai contempt case. But it was clear that the organisation was on target and as soon as Thunberg's tweet became a topic of conversation, there was immense room to expand on it and sweep the tales of farmers' agitation under the media carpet.

Noted historian Ramachandra Guha, who has come out in support of fellow Bangalorean Ravi, has been very vocal. He sees the entire episode in the light of its effect on the urban educated middle class and the continuous effort to suppress it. It began with the arrest of Priya Pillai of Greenpeace and was later expanded to include "award Wapasi gang", the *Tukde Tukde* gang of university students, the Shaheen Bagh traitors and now the climate change activists. The intention, according to Guha, is to suppress the educated middle class so much that the voice of dissent is lost as parents begin to become weary of their children working on the social media and demanding democracy and freedom and employment.

The legal end of the tale is well looked after too. In 2012, the then UPA government had amended the UAPA to include the definition of "economic security" and bring it within the purview of "terrorist activity". Under Section 15 of the UAPA, anything which disrupts the "economic security" of India would be considered an offence and an act of terrorism. "Economic security" includes financial, monetary

and fiscal stability, security of means of production and distribution, food security, livelihood security, energy security, ecological and environmental security.

This Section has now become a convenient tool to criminalise all opposition to the environmental clearances given by the government to big business, in the fossil fuel industry, for example. Climate activists who advocate for the reduction of carbon footsteps then become "terrorists" for jeopardising the economic security of India, while all that they are doing is opposing the policy of the government.

Both Shantanu Muluk (left) and Nikita Jacob were granted transit anticipatory bail by the Bombay HC in the case. The Delhi HC asked the Delhi Police to ensure no information was leaked on the ongoing probe and cautioned the media against sensationalism.

The charges against Ravi also reportedly include Sections 124A (sedition), 153A (promoting hatred amongst various communities on social/cultural/religious grounds) and 120B (criminal conspiracy) of the Indian Penal Code. She has also been accused of having Khalistani connections and plotting to "promote disaffection against the Indian state". The manner of her arrest has also raised serious questions as the Delhi Police's cyber cell landed in Bengaluru on February 13 and interrogated her and flew her down to Delhi where she was produced before the magistrate without a lawyer. The law, of course, says that the accused should be produced before the nearest magistrate and it has been put there quite deliberately so that the accused has a chance to defend herself against illegal arrest and the police have to explain their actions. In Ravi's case, it should have been a magistrate in Bengaluru.

Ravi also moved the Delhi High Court against three news channels which had been reporting extensively on her WhatsApp chats with Thunberg and others. Her contention was that these were selectively leaked by the Delhi Police to deliberately muddy the public mind against her. The Court issued notices to the three channels but Solicitor General Tushar Mehta said that the leaks had not been made by the Delhi Police and he would even file an affidavit to this effect. It is a good legal move by Ravi and the Court's directions eventually should also lay the foundation for media houses that pre-judge a case. It has happened too often and in too many important cases, including that of Sushant Singh Rajput where another 20-something girl was demonised consistently for being Rajput's girlfriend. Careers and lives can be made or marred owing to this false and continuous narrative.

VOICE AGAINST ARREST
Historian Ramachandra Guha (right) and other activists protesting in Bengaluru

The Mumbai lawyer Jacob has obtained a three-week "transit bail" from the Bombay High Court. It is strange that a bail should be referred to as transit since it finds no mention in the CrPC. It perhaps simply means a stay on arrest for three weeks till Jacob is able to apply for regular bail in a Delhi court where the case is filed.

Meanwhile, there is another toolkit doing the rounds on social media. This one stars Union Home Minister Amit Shah in a closed door meeting of party workers in Uttar Pradesh explaining how the social media has to be used or misused for the benefit of the party. Rest assured it will never come up for scrutiny. ■

I Kid You Not

Gujarat has decided to disqualify three political candidates under the norm. Other states too have had such stipulations, leading to a drop in India's fertility rate

By India Legal Bureau

THREE candidates from the municipal corporations of Vadodara and Rajkot were disqualified on February 8 under the two-child policy in Gujarat for electoral candidates. The nominations were challenged because each candidate had three children.

The election officer of Ward 15 of Vadodara Municipal Corporation (VMC) rejected the nomination of Dipak Shrivastav, a two-term corporator and son of BJP MLA Madhu Shrivastav. Dipak had filed his nomination as an Independent after the BJP denied him a ticket. He has three children, including one "adopted" by his father just before the polls were announced.

Independent candidate Viren Rami, a sitting corporator from VMC Ward 9, was also disqualified after BJP candidate Shrirang Ayare contended that he had stated the names of only two biological children. The nomination of Naran Savseta, Congress candidate for Ward No 4 of Rajkot Municipal Corporation, was also rejected on the same ground.

The order of the election officer cited Section 10 of the Gujarat Provisional Municipal Corporation Act, 1949, which was amended on August 4, 2015, and lays down that any candidate with more than two living biological children must be disqualified from contesting polls.

In 2005, the Gujarat government amended the Gujarat Local Authorities Act to "prevent a person having more than two children to be a member of panchayat, or the councillor of a municipality or municipal corporation". The amendment also added the clause to the other Acts governing elections to local administrative bodies such as the Gujarat Provincial Municipal Corporations Act, 1949, and the Gujarat Panchayats Act.

The rationale behind the two-child policy was said to be the need to "order and stabilise" the growing population. Last year, Ashwani Kumar Upadhyay, a BJP politician and lawyer, had asked for a law that would deny access to government jobs, subsidies and certain rights to those with more than two children. The denied rights, as per the petition, would include the right to vote, property and free shelter. In its response, the government told the apex court that it would not implement a mandatory two-child policy.

However, several states, including Assam, Maharashtra, Odisha, Rajasthan, Telangana and Andhra Pradesh already have some form of the two-child norm in place for those running for elected government posts or jobs.

If we consider state-wise, the picture is clear. In Rajasthan, candidates with more than two children are not eligible for government jobs. The Rajasthan Panchayati Raj Act, 1994, says that if a person has more than two children, he will be disqualified from contesting election as a *panch* or a member.

Madhya Pradesh has followed the two-child norm since 2001. Under the Madhya Pradesh Civil Services (General

Condition of Services) Rules, if the third child was born on or after January 26, 2001, one becomes ineligible for government service. The rule also applies to higher judicial services.

In Karnataka, the Karnataka (Gram Swaraj and Panchayat Raj) Act, 1993, does not bar individuals with more than two children from contesting elections to local bodies like the *gram panchayat*. Interestingly, the law says that a person is ineligible to contest "if he does not have a sanitary latrine for the use of the members of his family".

The Maharashtra Zilla Parishads and Panchayat Samitis Act disqualifies people who have more than two children from contesting local body elections (*gram panchayats* to municipal corporations). The Maharashtra Civil Services (Declaration of Small Family) Rules, 2005, states that a person having more than two children is disqualified from holding a post in the state government. Women with more than two children are also not allowed to benefit from the public distribution system.

UP too is mulling a proposal to include the two-child norm and a minimum education clause for candidates contesting *panchayat* polls, which are expected to be held early.

While there is no national two-child policy in India, there are local laws. These laws are aimed at politicians, both current and aspiring. Under the policy, people running in *panchayat* (local government) elections can be disqualified if they have not respected the two-child policy. The idea behind the law is that ordinary citizens will look up to their local politicians and follow their example.

In 2002, a government committee to review the working of the Constitution had recommended adding Directive Principle Article 47A which said: "Control of population. – The State shall endeavour to secure control of population by means of education and implementation of small family norms." However, this has not been done.

India's total fertility rate has fallen from 3.4 children per woman, aged 15-49 years, in 1992-93 to 2.2 children in 2015-16, data from the National Family Health Survey 4 shows. This is projected to fall to 1.93 by 2025, and to 1.8 by 2030, without any coercive law, as per a health ministry report.

In 1952, India became the first developing nation with the foresight to formulate a voluntary National Family Welfare Programme. Since then, especially, post the International Conference on Population and Development in Cairo in 1994, India's population discourse has followed an empowerment approach, which underscores that every woman has the right to decide if, when and how many children she should have.

It was during the Emergency imposed by the Indira Gandhi government that the two-child policy got an aggressive push. This was the decade when China shifted from its two-child policy to a one-child policy. Then during the 1980s, "*Hum Do Hamare Do* (We Two, Our Two)" was popularised through mass campaigns. The National Health Policy was adopted. The National Population Policy came in 2000 with the long-term objective of stabilising the population by 2045.

Dipak Shrivastav was one of the three candidates whose nominations were rejected. He has three children, including one "adopted" by his father just before the polls were announced.

When India's population crossed the one-billion mark on May 11, 2000, Prime Minister Atal Bihari Vajpayee said: "Population stabilisation cannot be achieved without all-round socio-economic development, and definitely not through coercion."

The 2019 bill in the Rajya Sabha for population control had asked for incentives for sterilisation by giving special benefits to those families where either spouse undergoes the procedure.

The story of population control through family planning is a curious case in India, which holds the distinction of being the first among developing countries to officially launch such a programme as early as 1951. As a result of the efforts of the government over the decades, India has already started experiencing a slowing down in its population growth and is on course to achieve population stabilisation with a total fertility rate of 2.2.

In fact, 24 states have already reached the replacement level of two children on an average. It is important to note that the decline in total fertility rate varies in states based on their health and development status.

Prime Minister Narendra Modi during his Independence Day speech in 2019 told the people that population control was a form of patriotism. Months later, the NITI Aayog called various stakeholders for a national-level consultation on the issue. This was subsequently cancelled following media glare. In 2020, the prime minister spoke about a likely decision on revising the age of marriage for women, which many stakeholders view as an indirect attempt at controlling the population size.

Better late than never. ■

Domino Effect

After the clash between farmers and the police on R-Day, a slew of lawsuits was filed. Courts have now ordered the Delhi police to upload all relevant FIRs from Nangloi police station on its website

By India Legal Bureau

FARMERS' protests against the three contentious farm laws have opened the floodgates to a host of new lawsuits. Following violent clashes between farmers and the police during the tractor rally in the national capital on Republic Day, the Delhi Police released a list of 120 people arrested in connection with 13 FIRs filed in connection with the said event.

The police also arrested journalists, including freelancer Mandeep Punia. Cases were also registered against other journalists, including Rajdeep Sardesai, and Congress MP Shashi Tharoor, for alleged mis-statements and wrong reporting on the rally violence. Thereafter, Tharoor, Sardesai and other journalists such as Mrinal Pande, Zafar Agha, *Caravan*'s Paresh Nath and Anant Nath filed separate pleas before the Supreme Court seeking protection from arrest. The Court on February 9 passed an order staying arrests and granted protection to the petitioners till the next date of hearing.

Apart from cases being registered against journalists and media houses, several FIRs were lodged against people allegedly involved in that day's violence. In an application filed by an accused named Deepak, who was arrested by the police and not supplied with a copy of the FIR despite being sent to judicial custody, Metropolitan Magistrate Abhinav Pandey on February 9 passed an order directing the Delhi Police to upload all FIRs registered from Nangloi police station on its website.

While issuing directions to the police, the judge observed: "Needless to state, in all FIRs pertaining to the violence ensued in context of farmer's agitation, registered at PS Nangloi, except where any reasons have been communicated to this court for not doing the same, the guidelines as laid by the honorable High Court shall be adhered to, and the FIR shall be uploaded on the website of the Delhi Police, so that representatives of the accused don't have to run from pillar to post."

Meanwhile, a petition was filed before the Delhi High Court by the grandfather of a deceased, Navreet Singh, a 25-year-old farmer who had an untimely death on January 26, 2021, while participating in the farmers' protest. The petitioner sought enforcement of the petitioner's right to fair investigation and justice, as well as the right to know the truth about his grandson's death/murder, as guaranteed under Articles 21 and 14 of the Constitution.

He also wanted constitution of a court-appointed and -monitored Special Investigation Team comprising of police officers with an unblemished track record of credibility and impartiality to carry out an independent and professional investigation in a time-bound manner.

The High Court bench, led by Justice Yogesh Khanna, on February 10 issued a notice on the plea and asked the respondent state to file a detailed status report. It listed the matter for next hearing on February 26.

On February 10, a Supreme Court bench led by Chief Justice of India (CJI) SA Bobde and comprising Justices AS Bopanna and V Ramasubramanian refused to entertain a PIL seeking

LEGAL ACTION
FIRs have been lodged against journalists, media houses and people allegedly involved in the Red Fort violence on January 26

a probe by a judicial inquiry commission into the R-Day violence. The Court granted liberty to the petitioner to withdraw and approach the concerned ministry. The petitioner had sought directions to set up an inquiry commission under the chairmanship of a retired Supreme Court judge to look into the clash.

At the hearing, the CJI said that the prime minister in his statement had said the law would take its own course, so the government was investigating it. "We are sure the government is inquiring into it and taking appropriate action," CJI Bobde told the petitioner.

Recently, another petition was filed in the Delhi High Court seeking direction to the centre and the Delhi Police to immediately remove those squatting in the garb of a farmers' protest and clear all the roads and public places after that. The plea, filed by one Dhananjai Jain, also sought the removal of Delhi Police Commissioner SN Shrivastava and punishment of police officers who had failed in discharging their duty. It claimed that the present case showed complete failure of the government and in particular the Delhi Police in maintaining law and order in a proper and effective manner and controlling the activities of miscreants. The matter was listed for hearing on February 16 before a bench comprising of Chief Justice DB Patel and Justice Jyoti Singh. However, due to the unavailability of the chief justice, the matter has been adjourned.

The farmers' protest has got support not just in India, but worldwide. After the R-Day clashes, pop star Rihanna drew global attention to the cause of the protesting farmers through a tweet. This soon became viral, gaining more than 7,00,000 likes. While the tweet was supported by many, including some celebrities, there was a backlash against Rihanna with her tweet being called propaganda against India.

Home Minister Amit Shah retaliated with a tweet with hashtags *#IndiaAgainstPropaganda* and *#IndiaTogether*. "No propaganda can deter India's unity! No propaganda can stop India to attain new heights! Propaganda cannot decide India's fate... only 'Progress' can. India stands united and together to achieve progress," it said.

Later, teenage climate campaigner Greta Thunberg shared a link of a pro-farmers' protest toolkit on Twitter. The toolkit is being linked to a conspiracy being hatched by a pro-Khalistani group.

Thereafter, the Delhi Police registered an FIR against the makers of the toolkit and arrested a 22-year-old climate activist, Disha Ravi, from Bengaluru. The Delhi Police in a tweet said that she is "the Editor of the Toolkit Google Doc & key conspirator in document's formulation & dissemination. She started WhatsApp Group & collaborated to make the Toolkit doc. She worked closely with them to draft the Doc".

Another tweet said: "In this process, they all collaborated with pro Khalistani Poetic Justice Foundation to spread disaffection against the Indian State. She was the one who shared the Toolkit Doc with Greta Thunberg." Ravi has been sent to police custody by the magistrate of Patiala House Court. Later, the police also arrested Nikita Jacob and Shantanu for allegedly sharing the toolkit on social media.

On January 12, the apex court had stayed the execution of the contentious farm laws and appointed a four-member expert committee to study the concerns of the farmers and take the opinion of the government. It has to submit its recommendations to the Court within two months. ■

A petition filed in the Delhi HC by the grandfather of Navreet Singh (far left) sought a court-appointed and -monitored SIT to carry out a probe into his death on January 26. The Justice Yogesh Khanna-led bench asked the state to file a status report.

Justice (retd) Kamaljit Singh Garewal

What Will Jack Think

The job of teachers in the lives of their students can be profound. Like French philosopher Albert Camus, I too had kind, thoughtful and morally upright teachers whose influence guided me in my legal profession

THE importance of integrity, honesty and morality in everyday life cannot be underestimated. Especially for those engaged in public service like politicians, journalists and lawyers. But this is more so for judges. Judges look at the facts, and then see the evidence which proves those facts and apply the law. In difficult cases, judges seek guidance from the views of other judges given in their judgments. A judge need not say anything more. Everything that needs to be said is said in the judgment itself. This is how integrity ought to be practised in the judiciary—by quietly doing the job of judging.

Lessons in integrity and morality begin at home. Parents are great teachers who influence children. In happy homes, which are full of compassion and kindness, children learn to be compassionate and kind. But sometimes children have unhappy, unstable, unsettled childhoods.

One can't help thinking of the children whose families went on mass migration last spring. Suddenly the head of the family became either unemployed or unemployable or deserted them or just left home to look for greener pastures in the city. Children from such homes need all the skills to survive in a hostile environment and may take to theft or bullying other children and lack compassion and love because they have not received any of it. Many children may overcome such an upbringing if they have a kind and understanding teacher.

It has been pithily said that the object of school education is to unlearn what you learn at home. And the object of college education? To unlearn what you learnt at school is the answer. And the object of college education is to prepare you for what life is going to teach you.

Albert Camus, the French philosopher, writer and Nobel laureate, also had a troubled childhood. Camus was born in Algeria in 1913. His father was a poor agricultural worker who fell on the battlefield of Marne in September

THE RIGHT GUIDANCE
Louis Germain (right), who taught Albert Camus (far right), the French philosopher, writer and Nobel laureate in school, encouraged him to think independently

1914. Camus was raised by his single, strong-willed, half-deaf, illiterate mother. This existentialist philosopher, one of the founders of absurdism, actually attended a strict Catholic school. At school, his teacher, Louis Germain, had very open views about religion. Though M. Germain taught Christian doctrines to his students, he also taught them to think independently and make up their own minds about the existence of God and religious beliefs.

A few months after winning the Nobel Prize in 1957, Camus wrote the following letter to his teacher:

Dear Monsieur Germain,
I let the commotion around me these days subside a bit before speaking to you from the bottom of my heart. I have just been given far too great an honour, one I neither sought nor solicited.

But when I heard the news, my first thought, after my mother, was of you. Without you, without the affectionate hand you extended to the small poor child that I was, without your teaching and example, none of all this would have happened.

On the way to joining the Punjab Super Judicial Service, I learnt much about the legal profession from a barrister in Ludhiana. And about life in general from a retired British colonel.

I don't make too much of this sort of honour. But at least it gives me the opportunity to tell you what you have been and still are for me, and to assure you that your efforts, your work, and the generous heart you put into it still live in one of your little school boys who, despite the years, has never stopped being your grateful pupil. I embrace you with all my heart.

Albert Camus

The grateful pupil never stopped loving his teacher who taught him open-mindedness. And the reply of M Germain is equally inspirational.

My dear child,
I do not know how to express the delight you gave me with your gracious act nor how to thank you for it. If it were possible, I would give a great hug to the big boy you have become who for me will always be "my little Camus."

Who is Camus? I have the impression that those who try to penetrate your nature do not quite succeed. You have always shown an instinctive reticence about revealing your nature, your feelings. You succeed all the more for being unaffected, direct. And good on top of that! I got these impressions of you in class. The pedagogue who does his job conscientiously overlooks no opportunity to know his pupils, his children, and these occur all the time. An answer, a gesture, a stance are amply revealing. So I think I well know the nice little fellow you were, and very often the child contains the seed of the man he will become. Your pleasure at being in school burst out all over. Your face showed optimism. And I never suspected the actual situation of your family from studying you. I only had a glimpse when your mother came to see me about your being listed among the candidates for the scholarship. Anyway, that happened when you were about to leave me. But until then you seemed to me to be in the same position as your classmates. You always had what you needed. Like your brother, you were nicely dressed. I don't think I can find a greater compliment to your mother.

It gives me very great satisfaction to see that your fame has not gone to your head. You have remained Camus: bravo. I have followed with interest the many vicissitudes of the play you adapted and also staged: The Possessed. I love you too much not to wish you the greatest success: it is what you deserve.

Know that, even when I do not write, I often think of all of you.

Madame Germain and I warmly embrace all four of you.

Affectionately yours.
Louis Germain

So what connection is there between Albert Camus' life and practice of honesty? A boy from a poor family, who never saw his father, could easily have slipped into despair and acquired bad habits, to end up as a loser. But he was a promising pupil, eager to learn, who got an influential teacher, and never looked back. This still doesn't answer the question about the context in which the two letters have been reproduced.

I had the great good fortune to spend five influential years under an English principal, who was also a thorough Indian, a kind, thoughtful and considerate man. After leaving school, I headed to college to become a physicist, but lost my way after three uneventful years, and joined law to prepare for competitive exams. When I didn't score high enough for a service of choice, I joined the Bar at age 24. On the way to joining the Punjab Super Judicial Service after 14 years, I learnt much about the legal profession from a barrister in Ludhiana. And about life ▶

In 1994, the three service chiefs (from left) Gen SF Rodrigues, Admiral L Ramdas and Air Marshal NC Suri were the pallbearers of their teacher, John Travers Mends Gibson (left). All had been his students at Joint Services Wing in 1949.

in general from a retired British colonel. But when I finally landed at Amritsar, on my first posting as an additional district and sessions judge at age 38, my first thought was to write to Jack Gibson.

John Travers Mends Gibson, Haileybury and Cambridge, had come out to India in 1937, to join as housemaster at a newly established boarding school in Dehradun. He spent the war years with the Royal Navy and became the first Principal of Joint Services Wing (later National Defence Academy). Providence ordained that at his funeral in 1994, the three service chiefs at that time, General SF Rodrigues, Admiral L Ramdas, and Air Marshal NC Suri would be his pallbearers; all three had been his students at JSW in 1949.

Much like Camus corresponding with his school teacher, many of Gibson's students would write to him after leaving school. They wrote about what they were doing at university, about the prospects of marriage or a job, about travelling overland to Europe, about financial problems, even asking for a loan. Jack would often send his recommendations to colleges and prospective employers, and try and help his pupils in whichever way he could. The correspondence was published in his book *As We Saw It* in 1991. The letters give detailed glimpses into the social history of the period 1970 to 1990. And how young men who went on to join the IAS, defence services, journalism, academics and business shared their successes and anxieties with their teacher, who continued to remain their friend, philosopher and guide.

So like many other old boys, I wrote to Gibson (many students also called him Jack) with the news that I had joined the judiciary. I explained that "one reads a lot about breakdown of law and order. I, therefore, consider dispensation of justice as a great challenge and a rewarding task."

And I received a prompt reply saying: "I expect this means a drop in your earnings (as I don't expect you to take more than your salary) but I hope that this does not hit you too hard." A lifelong lesson which has remained with me. But sometimes one is put in an awkward situation. As district and sessions judge in a distant place, which happened to be the area to which the newly elected chief minister also belonged, I was invited to preside over a meeting of the local Bar to felicitate the popular leader. Of course, all the speakers before me spoke about what a great day it was to welcome the chief minister and how everyone was looking forward to improvements in the court complex, its infrastructure and so on.

Should a judge praise anyone in glowing terms, at a public gathering, with words like "popular, dear, vibrant, visionary"? I was approaching the zone for consideration for elevation as vacancies were likely to arise during the tenure of the chief minister. But I stopped myself from showering admiration, remembering Jack and asking myself what he would think. So I mumbled a few words about the sessions division and mentioned legal services and legal aid schemes which we were working on. I expected the government to help in promoting these welfare measures, hoping the chief minister may announce his government's support, but no such thing happened. Since I had spoken in English, the first thing the chief minister remarked was he was shocked that judges did not speak and work in Punjabi. That was my first and last meeting with any politician, either in public or private. But things are a lot different nowadays, in ways which are embarrassing to describe. ■

—The writer is former judge, Punjab & Haryana High Court, Chandigarh and former judge, United Nations Appeals Tribunal, New York

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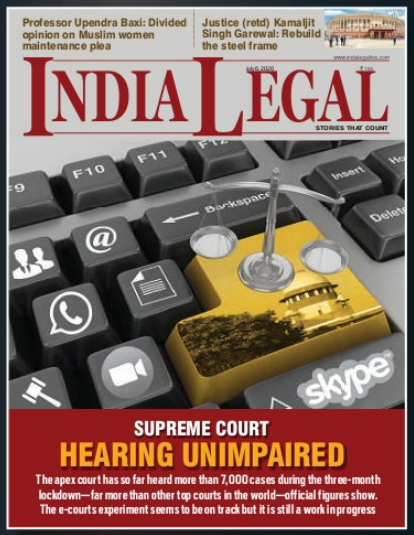
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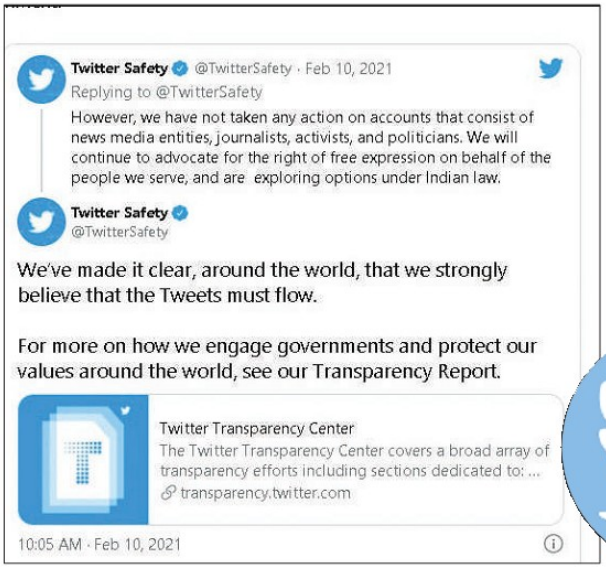
Na Vijayashankar

Taking on Twitter

After foreign tweets on Indian developments led to controversy, the government has reacted to Twitter on Koo, a homegrown micro-blogging site. Having two platforms will cool down passions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Replying to @TwitterSafety
However, we have not taken any action on accounts that consist of news media entities, journalists, activists, and politicians. We will continue to advocate for the right of free expression on behalf of the people we serve, and are exploring options under Indian law.
Twitter Safety
@TwitterSafety
We've made it clear, around the world, that we strongly believe that the Tweets must flow.
For more on how we engage governments and protect our values around the world, see our Transparency Report.
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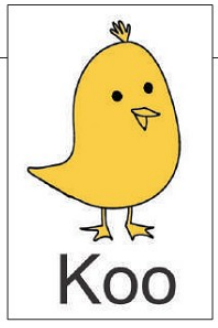
Government of India
Upon the request of Twitter seeking a meeting with the Govt., the Secretary IT was to engage with senior management of Twitter. In this light a blog post published prior to this engagement is unusual. Govt. will share its response soon.
41 Re-Koo 110 Likes



AN interesting development took place on social media recently. Twitter put out a message on its blog addressed to the government, and this was responded to on Koo, an Indian micro-blogging app.

The latest surge of people moving to Koo started in the first week of February 2021. A stage was reached where TV news anchors popularised the use of Twitter for discussion of political debates. I had then advocated that the time had come to switch to an Indian blogging app.

Now the new trend is "Watch Twitter" and "Post on Koo". Over a period of time, this will create one stream of opinion on Koo, while the other may continue on Twitter. If somebody wants to respond on one platform, they have to at least view the other one too. Perhaps common hashtags will be used on both platforms for debating. This is a strange situation where both may see an increase in hits. But the number of active users on Twitter and re-tweets could see a significant downtrend. Twitter will remain predominantly a medium to reach audiences outside India, while Koo would be the preferred platform to reach out to an Indian audience.

For a long time, terrorists in India have misused freedom of speech guaranteed under the Constitution. Similarly, we will see many Twitter handles now being used to criticise Twitter and perhaps many Koo handles to criticise Koo.

The popularity of Twitter was centred around politics and the interest in politics was inherently regional. But of late, Twitter was used by some foreign celebrities to tweet about Indian developments. This raised the question whether these tweets were fake or whether these celebrities were paid to do so.

While it is fine for two Indians to

WATCH TWITTER POST ON KOO
The stand-off between Twitter and the government of India over blocking certain content has made the Koo app become prominent

debate and argue over contentious political issues, when a citizen of another country joins the discussion, it vitiates it, and takes a "national" or "anti-national" dimension. As an Indian, my interest in whether Democrats have committed a fraud and won the elections in the US can only be an opinion of an outsider; it cannot be part of a heated debate with American voters who may have a strong view of their own. I must know my limits before commenting on such issues. Similarly, American pop singers and juvenile activists need to be circumspect while commenting on the farm law agitation because they do not know the reality.

Showing cross-border interest in politics is inherently an issue that will raise the "anti-national" rhetoric. Whether an Indian comments on Imran Khan or a Pakistani comments on Narendra Modi, it is a cross-border attack and if it crosses the limits of decency, each country has the right to be annoyed.

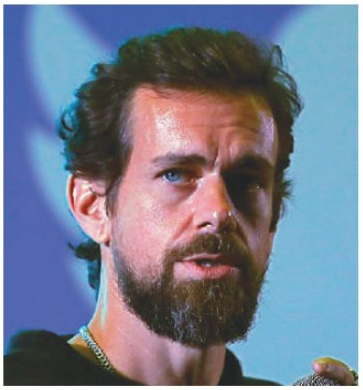
While the Indo-Pakistani information war was based on historical enmity and to some extent religion, the current controversy where a Rihanna or Greta Thunberg or Meena Harris are involved was driven more by the commercialisation of celebrities on Twitter handles. Many of these handles are operated by PR firms, and tweets and re-tweets are done for money. This "Tweet for Cash" had eroded the credibility of Twitter as a medium of independent crowd-sourced news.

With people now keeping a watch on the two platforms and posting on the one of their choice, perhaps there will be some order to the chaos. Instead of trolling on the same platforms, people will "cross troll". This could reduce the intensity of the impact of trolls and in the long run, reduce it to an extent. Only serious counter opinions may get expressed and trolls for the sake of trolling would reduce. This would be a welcome development.

The Indian government first tried to regulate the propaganda on Twitter through Intermediary Guidelines under Section 79 of the Information Technology Act 2000/8 with a recommended amendment to them. But it succumbed to the verbal assault from the opposition and did not push through the notification. Now when the new Personal Data Protection Bill is passed, there will be another attempt to regulate the "Verification of Social Media handles" which would put the brakes on unrestricted growth of fake accounts on social media.

While on Facebook the menace of fake accounts surfaced as cyber crimes, on micro blogging platforms like Twitter, it surfaced as an attempt to mould political opinions. However, if there is nobody to listen to my opinion or counter opinion, I will have to stop commenting. In the Twitter warfare, as long as there was no alternative, both sides used it to fight. This created friction and added fuel to the controversy. The beneficiary was the platform, which could claim more traffic and therefore, get more revenue from advertisements.

Now there will be separate platforms on which different views can be expressed and only cross platform users will know and be able to react to counter views. This will cool down passions and make these platforms more useful to the community.



Twitter is taking on the policies of the Indian government, with Twitter CEO Jack Dorsey liking the tweets of Rihanna and also joining hands with Indian black money supporters.

Twitter has reached a point of no return as it is taking on the policies of the Indian government directly at the promoter level, with Twitter CEO Jack Dorsey liking the tweets of Rihanna and also joining hands with Indian black money supporters to promote cryptocurrencies, which the government of India is committed to ban. It is no longer a subtle war between Twitter supporters and the government and it seems that the Twitter management is taking up leadership in this war. In its latest statement, Twitter said: "We will continue to advocate for the right of free expression on behalf of the people we serve. We are exploring options under Indian law—both for Twitter and for the accounts that have been impacted."

Twitter, therefore, clearly thinks that it is the conscience-keeper for the protection of fundamental rights of Indian citizens. But Twitter policies of granting "verified status", some of which are given to AI algorithms and PR firms, are flawed and its intentions, suspect. The government's response on Koo to Twitter is, therefore, a historic moment in social media. However, this has to be taken to the logical conclusion and the government has to quickly come up with regulation for social media so that accountability is built into freedom of speech.

This can be done by fast tracking the Personal Data Protection Bill or by even coming out with a regulatory guideline under Section 79 of ITA 2000 on social media platforms similar to the notifications available on cyber cafes and matrimonial websites. This action can be taken at the departmental level and has to be expedited. ■

—The writer is a cyber law and techno-legal information security consultant based in Bengaluru

Prima Facie *Digital Giants and Media Payments*

Sujit Bhar

A New Net-scape

Google's deals with several news organisations to pay for exclusive content could set a precedent and open a Pandora's Box of payment demands. This has the potential to change the dynamics of Internet business models

A house of cards comprises slender pieces of paper precariously balanced atop others, all living together in flimsy points of contact that agreed to cement the whole with just love and fresh air. If you consider the bits and pieces architecture of the entire system and how it has been balanced atop an ocean of fleeting trust, Google's house, as imposing as it looks, is pretty much the same.

And there is Facebook, which gained members by the millions and then rose to a billion. The financiers weren't sure for a long time on how to monetise that footfall. Finally, data sales became a controversial source, landing them in the Cambridge Analytica mess. That is another house of cards.

Now that Rupert Murdoch's News Corp. has etched out a three-year path breaking deal with Google, a scary, stiff breeze has started blowing through the top storeys of these houses. The clamour was for payment for news. This deal will see Google pay for 30 News Corp. publications, including *The Wall Street Journal* in the US to *The Times* in the UK and *Sky News* in Australia. Such information will feature in Google's News Showcase section.

News content is not big business for Google. While Google's overall, worldwide revenues increased to over $160 billion in 2019, the news searches within that was miniscule. News makes up for only 12.5 percent of Google's searches in Australia. Other multimillion-dollar deals have been struck between Google and other Australian publishers, including Seven West, Nine Entertainment and Junkee Media, reports say.

Last year, Google had talked about "high-quality content" from publishers around the world and it had a $1 billion kitty ready for its News Showcase programme. This is part of that. Google has already signed up hundreds of media outlets in Germany, Brazil and the UK, etc.

Facebook, meanwhile, blocked Australians from sharing or viewing news content on its platform. This is a different approach, but makes sense.

These deals in themselves and the accompanying financials are mere indicators of the entire situation. These are business consolidation proposals, but if the Australians manage to pass legislation, making this enforceable, the situation could turn messy. What could ensue

from this is that a Pandora's Box of payment demands from around the world will open. Whether that is a good or a bad thing only time can tell, but this has the potential to completely change the dynamics of international web-based information sharing and payment systems, as well as the future of houses of cards.

Here are some of the various interesting fallouts from this.

What news organisations wanted was payment for information and data that they take a lot of pain in and spend a lot of money on creating. All that effort can disappear in a whiff, if Google web crawlers, helped by AI-based algorithms, can place data on the web. This deal should allow journalists to earn a living wage and help news organisations prop up their failing publications. The internet has all but killed real journalism and this could be a move in the right direction.

However, others are watching too. Some YouTube content (YouTube is owned by Google) comprises very highly researched data. That definitely qualifies for Intellectual Property, and in a new world, these can demand payment. Citizen journalism has grown across social media platforms and it, too, could easily qualify as IP. Every bit of data of top corporate bodies can be classified as IP, top rock bands will demand money for use of their stars' pictures, film stars would demand clearance from their agents for use of their pictures. There will, simply, be no end to it.

If Facebook has to pay for carrying posts having news links and news copied from newspaper sites and pictures of clippings, the entire business model of the site could come apart.

Good for all of them, but here is the first rub. Google's stakeholders will be crying murder over falling dividends, which may force Google to impose a small charge for each and every search. Even a minuscule charge will be enough for Google to rake back in many billions. How big is this? Google does not share the exact number of searches, but it sure handles an average of 3.8 million searches per minute worldwide. That is 228 million searches per hour, 5.6 billion searches per day, or 2 trillion searches per year! Do the math.

However, here is a caveat.

The first problem on the horizon is in the form of the US Justice Department, which, in October last year sued Google for violating antitrust laws. The department had filed a complaint against Google to restore competition in search and search advertising markets. The civil antitrust lawsuit in the US District Court for the District of Columbia was headed by the Justice Department, along with 11 state Attorneys General. The complaint was about Google unlawfully maintaining monopolies through anticompetitive and exclusionary practices in the search and search advertising markets and to remedy the competitive harms.

There were Attorneys General from Arkansas, Florida, Georgia, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, South Carolina, and Texas.

Stopping Google or even breaking up of the massive monolith could result in complete mayhem on the net. In the face of this threat, Google would be thinking twice about passing on the possible cost burden of paying for content, but a possible break-up could also rob the sheer power of its web crawlers from looking into the nooks and crannies of the World Wide Web. What that means is, if content in a Google search lacks the width and depth people have become used to, they will switch to the next best, possibly where Microsoft Edge waits. The mass shift from the days of Netscape is yet to be forgotten.

As far as Europe and Asia are concerned, there is another problem lurking in the dark: privacy. WhatsApp (a Facebook subsidiary) is already in a ▶

PATH BREAKING STEP
Rupert Murdoch's (left) News Corp has struck a deal with Google. It will see Google pay for 30 News Corp publications and the information will feature in the News Showcase section of Google

In the emerging scenario, Google will, probably, be forced to impose a small charge for each and every search. Even a minuscule charge will be enough for Google to rake back in many billions.

bind in India, having had to postpone the rollout of its new privacy policy to May 15 and with the Supreme Court having clearly told the company that privacy of citizens of this country come foremost.

Google has already done a deal in Europe, with reference to the Right to be Forgotten, though it has escaped a bigger fallout by maintaining that such links (that want permanent deletion) would not be visible in Europe, but would be available elsewhere. As far as China goes, Google has really not been able to make a dent in what could have been the world's largest market.

The issues are complex and interconnected. While the new deals with news organisations have been just about money, soon geopolitics and international law will move in with a vengeance. Even a company with a $1 trillion valuation could soon be wading through a quagmire of legal, political, financial and social issues.

People have not forgotten the breakup of AT&T and the antitrust suit against Microsoft where its Internet Explorer was relegated from prime position in Windows-based PCs. Google will not be allowed easy passage either. US Attorney General William Barr has said: "Today, millions of Americans rely on the Internet and online platforms for their daily lives. Competition in this industry is vitally important, which is why today's challenge against Google... for violating antitrust laws is a monumental case both for the Department of Justice and for the American people... This lawsuit strikes at the heart of Google's grip over the internet for millions of American consumers, advertisers, small businesses and entrepreneurs beholden to an unlawful monopolist."

Technically, though, the AT&T and Microsoft examples may not apply in Google's case. Unlike Microsoft or AT&T, Google is yet to make its common users pay to use its services. What it has done is leverage the mammoth viewership for advertisements. And in doing that, both Google and Facebook have been hugely successful. According to Australia's competition watchdog, for every $100 (US) spent on online advertising, Google captures $53, Facebook takes $28. That leaves a thin sliver of $19 of the entire ad pie for the rest. That is deemed unfair.

Google also has other problems. Google Earth is still the best we have about maps. However, the Indian government, under its Atmanirbhar programme, has just now set free the process of map making and generation of geospatial data. This means that Indian private players will now have the freedom to handle such information without prior approval or restriction. Mapping has, so far, been a government preserve, handled by the Central government's Survey of India. Now any Indian entity can take part in the process and profit from it.

This will only undermine the dominance of Google maps, a product that Google has efficiently milked. In fact, it was the availability of Google maps that initiated this government move. The Department of Science and Technology said that what is readily available globally need not be restricted in India.

For Facebook, the issue is probably even more complex. The allegation is that Facebook carries posts that have news links and news copied from official sites of newspapers. There are even pictures of clippings.

If Facebook has to pay for these, the entire business model of the site—developed through thousands of permutations and combinations of a hugely popular site with no viable business model attached—could come apart. Today Facebook is not just about sharing pictures of your boyfriends and girlfriends or food preferences, it is also about important choices. Another issue comes up from here. If I like an exclusive article in a newspaper I bought, could I be legally wrong in taking a picture of that article and sharing it with my 5,000 Facebook friends, who could then share it further to their thousands and hundreds of thousands fiends?

Is that a Napster-like model? Is this like pirating a book? If the individual cannot be hauled to a court of law, then can Facebook be sued? So far Facebook has only stopped Australians from viewing news. How will its finances be affected if it has to enlarge this ban?

More importantly, can Facerbook look into its own Messenger, which is said to be end-to-end encrypted? How would that infringe on the person's privacy? Can Facebook be forced to do that, just because there is a financial angle at stake?

This will get messy; so messy, that all acceptable online business models could go bust. That could change the entire internet landscape as we know it. ■

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Woman on Top

The World Trade Organisation (WTO) has created history by appointing the first female and also the first African head of the global body tasked with regulation of international trade between nations. The woman now in charge of that unenviable task is Nigeria's Ngozi Okonjo-Iweala.

She is no stranger to world trade and economy, having served as Nigerian finance minister and is also a World Bank veteran. She has, arguably, the toughest job in the global arena.

Even before Covid-19 battered the global economy, the WTO was crippled by stalled trade talks and serious trade tensions between the United States and China. The organisation has been virtually paralysed since the Covid-19 outbreak which badly affected international trade, with Brexit adding to the toxic mix.

Okonjo-Iweala's task, to get the global economy moving again, is fraught with uncertainty. The Geneva-based WTO has been leaderless since last August. The 164-member organisation appoints its head through a consensus among members. Her appointment was held up by former US president Donald Trump who defied the consensus and also brought its dispute settlement appeal system to a halt.

Her credentials are solid. A development economist by training, she has degrees from MIT and Harvard and spent 25 years at the World Bank, becoming its managing director, the second highest position.

Covid Passports

It is an idea whose time may have come. Denmark has become the first country to officially back the concept. Last week, Denmark said it could introduce a Covid-19 passport as early as later this month. The finance minister said the step was necessary because "the business community needs to be able to travel".

The small Scandinavian country could become the first to formally embrace the technology that is considered controversial. The country is still under lockdown till February 28. However, Denmark is also one of the world's most digitised countries and it could become a test case for this new technology.

The Covid-19 passport concept, which certifies that the holder has been tested and returned a negative result or recovered from Covid-19, rests on two types of technology. One relies on remote cloud servers where information is stored in bulk. The other uses Blockchain, a more complicated process.

The controversial aspect lies in the fact that personal medical data is sensitive, while others say it could be discriminatory, creating a situation where only wealthy countries have access to the vaccine and they are the only ones travelling. The International Air Transport Association has been pushing for such passports for some time. Other entities working on the technology are IBM, secure ID company Clear and the Commons Project's cloud-designed CommonPass. They basically use QR codes that can be updated to reveal medical data that is regularly updated.

Other European countries are also willing to experiment with the new passport but are waiting for someone to take the lead. Denmark has done just that and Sweden could soon follow.

Prizing Science

He is the global face of the fight against the Covid-19 pandemic, a position that has made him a scientific superstar. Now, Dr Anthony Fauci, President Joe Biden's chief medical advisor, has been awarded the Dan David Prize, an Israeli award that carries a $1 million grant to the recipients.

The international awards are given in three categories—Past, Present and Future—with Fauci winning the Present award given for "achievements that shape and enrich society today."

The Dan David Prize according to its website "aims to promote scientific, technological and humanistic achievements that advance and improve our lives and our knowledge of the world". Fauci was praised for "courageously defending science in the face of uninformed opposition during the challenging COVID crisis". Fauci was the only individual winner, with the other category awards going to three winners each. Earlier recipients include former US Vice President Al Gore, ex-British Prime Minister Tony Blair, cellist Yo-Yo Ma, and author Margaret Atwood.

An Apple Car?

The automobile industry is abuzz with rumours that Apple is close to striking a deal with Hyundai's Kia to produce an Apple-branded autonomous car. The tech giant has been working on a design for the "Apple Car" and was looking for an established automaker willing to allow Apple to control the software and hardware that will go into the vehicle. That means it will be an "Apple Car", not a Kia model featuring Apple software—the South Korean automaker's recent models all feature Apple Carplay.

However, what made it attractive for Apple was that Kia had manufacturing facilities in America. Industry insiders say that the Apple car will be autonomous, electric vehicles designed to operate without a driver which could mean Apple cars, at least initially, may focus on package delivery operations or robotaxis, posing a challenge to Tesla, which is rolling out self-driving vehicles, including robotaxis.

An Indian Winter

With the global tourism industry on life support, thanks to the pandemic restrictions and travel fears, only one country has defied the odds: Maldives. The Indian Ocean island archipelago normally gets over 1.7 million tourists a year. In 2020, it had 5,55,494. That may show a sharp drop but it is also one of the most successful tourism stories post the pandemic. Part of the reason for that is India.

According to the Maldives Tourism Department, the largest number of tourists in 2020 were from India. Indeed, the Indian media has been full of photos of Indian celebrities frolicking on the beaches and generally chilling out. They include everyone from Alia Bhatt (below left), Katrina Kaif (below right), Farhan Akhtar, Tiger Shroff and rumoured girlfriend Disha Patani, Varun Dhawan to a host of other Bollywood stars.

Maldives opted to fully reopen to travellers from any country in July 2020. Tourism contributes 28 percent of the Maldives' GDP, one of the highest in the world. What makes it more attractive is most hotels and resorts are on their own private islands and there are over a thousand to choose from, making isolating and social distancing easy. Also, transfers from the airport are by private boats so visitors reach their destinations without encountering any other tourists. Maldives also benefitted from the new trend of longer stays and reliable internet and wi-fi connections so tourists could work, and play.

Shaan Katari Libby

A Powerful Tool, but Handle with Care

As diamond merchant Nirav Modi faces extradition from the UK on February 25, the fact is that India has not had much success in this sphere. With Vijay Mallya too facing extradition, the issue is a complex one

WANTED FUGITIVES
The UK has become a safe haven for economic offenders from India, such as (from left) Vijay Mallya, Nirav Modi and Lalit Modi, who are yet to be extradited

JUDGEMENT day for wanted diamond merchant Nirav Modi is on February 25, 2021, when it will be decided by a UK court whether he can be extradited to India to face charges of fraud and money laundering in relation to a Punjab National Bank scam. This is a good time to look at the issue of extradition and examine its pros and cons.

Extradition is the formal process of one state surrendering an individual to another for prosecution or punishment for crimes committed in the requesting country's jurisdiction. It is typically enabled by a bilateral or multilateral treaty. Some states will extradite without a treaty, but those cases are rare.

Extradition is founded on the broad principle that it is in the interest of all civilised nations that criminals should not go unpunished. Another reason why extradition is important is the deterrent effect—a criminal cannot escape punishment by escaping to another country. Extradition lends itself to the notion of genuine international co-operation. It's based on reciprocity. The State on whose territory the crime has been committed is in a better position to try the offender because evidence is more freely available there.

The earliest known diplomatic document that contains an extradition provision (in this case, for reciprocal rendition of fugitives) was the Treaty of Peace between Ramses II, Pharaoh of Egypt, and the Hittite King Hattusili III. The extradition system evolved in Europe from the 18th century onwards. "When the "nation-state" evolved, the sovereign continued to desire the rendition of criminals and, frequently, "political" offenders. As modern theories of criminal science evolved, so did theories of extradition. The notion that the relative power of sovereigns required the extradition of fugitives gave way to the view that natural right and justice required extradition.

Extradition today is usually based on the existence of a treaty. But it can also take place without one. In 1872, the French minister of justice provided explicit recognition of the authority to extradite in the absence of any treaty when he issued a "circulaire". This

allows extradition to be granted without a treaty on the basis of reciprocity.

The Supreme Court in the famous case of *United States vs Rauscher* (1886) held that apart from the provisions of treaties on the subject, there exists no well-defined obligation on one independent nation to deliver to another fugitives from its justice although such delivery has often been made.

The legal basis for extradition may be found in various conventions. At the heart of these is the concept of *aut dedere aut judicare*—states must either surrender a criminal or prosecute the offender in its own courts. Extradition is recognised in the 1949 Geneva Conventions; The Convention for the Protection of Cultural Property in the Event of an Armed Conflict 1954; The Convention for the Suppression of Unlawful Seizure of Aircraft 1970; The United Nations International Convention for the Suppression and Punishment of the Crime of Apartheid 1973; The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1987; The UN Convention for the Suppression of Terrorist Bombings 2001 and The UN Convention Against Corruption 2005.

Sometimes, extradition works well to keep dangerous individuals away from the world as long as possible. A case in point is Rendon-Herrera, "the most feared narco-terrorist in Colombia". Rendon-Herrera was extradited to the US in 2018 from Colombia, where he had been in custody since 2009 and was sentenced to 20 years for homicide, forced disappearance, torture, kidnapping and drug trafficking. As Don Mario continued to run the drug cartel from behind bars, Colombia's president Juan Manuel Santos agreed to extradite him to the US. Before he was in custody, Rendon-Herrera was famous for his designer suits, new Rolex watches every day and lighting his cigars with $100 bills, the *New York Post* reported. US Attorney Richard Donoghue said they were "committed to cooperating with our international partners to dismantle illicit organisations like Clan Usuga and stem the destructive effects wrought by this violent armed criminal group".

The US has extradition treaties with over 100 countries. India has extradition treaties with 50 countries and extradition arrangements with 11. Since 2002, according to Mondaq, foreign countries have extradited 75 fugitive offenders to India. Of these, 24 have been extradited to India in the last five years from over 20 countries, including the UAE, Canada, the US and the UK. There remain over 50 pending extradition requests by India.

Extradition has become important in combating transnational criminal organisations, including those involved in terrorism, counterfeiting, drug trafficking and cybercrime.

Historically, India has not had success extraditing fugitives from the UK. Both countries entered an extradition treaty in 1992. However, between 1992 and 2016, India has successfully got extradited only one (out of 23 requests) from the UK: Samirbhai Vinubhai Patel in 2016 for murder. Vijay Mallya has recently been ordered by the UK courts to be extradited to India. However, on January 24, 2021, his lawyer told the High Court of London that he has applied for "another route". Mallya is currently on bail in the UK and faces charges of defrauding Indian banks with regard to his defunct Kingfisher Airlines.

Extradition has become increasingly important in combating transnational criminal organisations, including those involved in terrorism, counterfeiting, drug trafficking and cybercrime.

However, sometimes extradition does not work. In some nations, there are no extradition treaties. This means that a person convicted of a crime in one country does not have to be returned there to face trial or punishment. Even in nations with treaties in place, geopolitical issues can lead to disputes over extradition. ▶

For example, there are countries with extradition treaties with the US, who are known for refusing extradition requests. They are Ecuador, Cuba, Bolivia, Nicaragua, Iceland, Switzerland, Venezuela and Zimbabwe. Edward Snowden, a former CIA employee and an American whistleblower who leaked highly classified information from the National Security Agency in 2013, fled to Russia. US authorities asked Russia to extradite him. However, Russia had proposed a treaty with the US asking for the mutual extradition of criminals. This was not acceded to by the US. In a classic case of tit-for-tat, because the US never extradited any Russian criminal who took asylum there, Snowden's extradition is unlikely.

Sometimes, domestic laws make extradition impossible. For instance, even though the US has an extradition treaty with Japan, most extraditions are not successful due to Japan's domestic laws. For the US to be successful, it must present its case for extradition to the Japanese authorities. However, certain evidence is barred from being presented in these proceedings such as the use of confessions, searches or electronic surveillance. In most cases involving international drug trafficking, this kind of evidence constitutes the bulk of evidence gathered in the investigation of a suspect for a drug-related charge. Therefore, this usually hinders the US from moving forward with the extradition of a suspect.

Extradition is often used as a bargaining chip. Beijing introduced a security law, creating new offences which could see Hong Kong residents sent to mainland China for trial.

Several countries do not subscribe to extradition of their own nationals. For instance, extradition law in China is the formal process by which a fugitive found outside the country's jurisdiction is surrendered to the jurisdiction where an alleged offence has taken place for trial or punishment under Chinese law. China does not allow the extradition of its own nationals. The position is similar in Indonesia, Bangladesh, Russia, Vatican City and over 70 other countries.

Extradition is often used as a bargaining chip. Beijing introduced a security law at the end of June, creating new offences which could see Hong Kong residents sent to mainland China for trial. Critics fear this could lead to pro-democracy protesters in Hong Kong receiving life sentences. Unhappy with outside interference, China has decided that the Hong Kong special administrative region will suspend its agreements of surrendering fugitive offenders and of mutual assistance in criminal matters with Canada, Australia and the UK.

The three countries, along with New Zealand and the US, are part of the so-called Five Eyes intelligence alliance. The US has signalled it plans to suspend its extradition treaty with Hong Kong. The UK and others fear the new arrangement could see anyone extradited to Hong Kong from their territory being subsequently sent to China.

Extradition is thus open to suspension, and there is the dual criminality

Sometimes, extradition works well to keep dangerous individuals away from the world as long as possible. A case in point is Rendon-Herrera, "the most feared narco-terrorist in Colombia".

Edward Snowden, a former CIA employee and an American whistle-blower, has been living in exile in Russia since 2013. He is wanted in the US on espionage charges.

In WikiLeaks founder Julian Assange's case, it was decided by a UK judge that his extradition to the US would not be permissible owing to his severe mental health issues.

requirement—which means the crime has to be one in both jurisdictions. Typically upon receipt of an extradition request, a judge will consider the following: dual criminality and if any extradition objections exist. Australia will refuse extradition if, for example, a person has already been punished for the offence or is unlikely to receive a fair trial if extradited. Also, the country will often consider whether a person will face execution if extradited.

In India, extradition requires *prima facie* evidence. The Extradition Act 1962 provides stipulated offence, the dual criminality requirement, a *prima facie* case, the rule of speciality and a fair trial under human rights laws. The rule of speciality is a principle of international law included in most extradition treaties whereby a person who is extradited may be tried only for the specified offences and not for any others. India will extradite its own nationals on the basis of reciprocity. If the other treaty State does not extradite, India also bars extradition of its own nationals. There are several countries to which extradition of Indian nationals is barred by the bilateral extradition treaty. These include France, Germany, Spain, Russia, Turkey and several others.

In WikiLeaks founder Julian Assange's case, it was decided that extradition to the US would not be permissible owing to his severe mental health. Assange spent almost seven years inside the Ecuadorian embassy in London. His extradition to the US has been blocked by a UK judge, and this has been cited by Nirav Modi's barrister Clare Montgomery, as also Article 3 of the European Convention on Human Rights (ECHR) 1950 to protect him from torture or inhuman treatment. Mallya too is understood to have sought asylum in the UK under Article 3 of the ECHR, which prohibits "inhuman or degrading treatment or punishment".

"Extraordinary rendition" is an extrajudicial procedure in which criminal suspects, generally suspected terrorists or supporters of terrorist organisations, are transferred from one country to another. The procedure differs from extradition as the purpose of the rendition is to extract information from suspects, while extradition is used to return fugitives so that they can stand trial or fulfil their sentence. The CIA allegedly operates a global extraordinary rendition programme, which from 2001 to 2005 captured an estimated 150 people and transported them around the world. Extradition is arguably a more legitimate transparent procedure.

While extradition helps governments bring back criminals, there is no guarantee that countries will work harmoniously. There are also concerns about political prisoners being extradited. There is no easy answer here for an interconnected world—extradition is a powerful tool—and one to be handled with care. ■

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Shivanand Pandit

Boosting Infrastructure

While the centre's plan to establish a Rs 20,000-crore DFI for infrastructure projects is an old idea, its success will depend on transparency and accountability and its engagement with stakeholders

WHILE unveiling the recent budget, Finance Minister Nirmala Sitharaman mooted the creation of a professionally supervised Development Finance Institution (DFI) to help fund India's infrastructure. She said the government would establish a Rs 20,000-crore DFI with the intention of assembling Rs 111 lakh crore for financing infrastructure. She also said the government had a target to have a loan portfolio of at least Rs 5 lakh crore in 36 months.

The DFI seems to be the main ingredient of the government's thrust to generate jobs and enhance demand. The plan also comprises a capital expenditure plan of Rs 5.54 lakh crore for 2021-22. This was revised from Rs 4.39 lakh crore for 2020-21. The government budgeted for around 26 percent increase in capital expenditure, anticipating that the multiplier effect and resultant job creation would bring gross domestic product close to an 11 percent growth rate.

Debt funding through the Infrastructure Investment Trust and Real Estate Investment Trust will be allowed through relevant amendments. A bill for the setting up of DFI has been listed for the current Parliament session. It explains the Institution "as a provider, enabler and catalyst for infrastructure financing and as the principal financial institution and development bank for building and sustaining a supportive ecosystem across the life-cycle of infrastructure projects".

In her 2019-2020 budget speech, Sitharaman had proposed a study for establishing DFIs for stimulating infrastructure financing. Around 7,000 projects have been zeroed in on under the National Infrastructure Pipeline (NIP) with an estimated investment of Rs 111 lakh crore during 2020-2025. She said this would help offer superior infrastructure and enhance the excellence of life. It will also be crucial for becoming a $5 trillion economy by 2025.

DFIs, also recognised as develop-

FOR ECONOMIC DEVELOPMENT
A DFI is an agency that finances infrastructure projects, like roads, which are of national importance. The centre plans to generate jobs and enhance demand through this move

ment banks, are not new in India. Three national-level DFIs—the Industrial Finance Corporation of India (IFCI), Industrial Credit and Investment Corporation of India (ICICI) and Industrial Development Bank of India (IDBI)—were founded between 1948-1964 to offer long-term funding in the industrial segment. Some sector-specific DFIs such as EXIM Bank, National Housing Bank and Housing and Urban Development Corporation were founded in the 1970s and 1980s. Also, state-level DFIs were established to give concessional financing to small and medium enterprises.

However, the model of DFIs disappeared over the last two decades. Their funding became weak with the removal of concessional funding through long-term operation funds from RBI under financial reforms in the early 1990s. The financial status of state-level DFIs worsened because of a surge of non-performing assets and decrease in states' financial capacity. This made the business pattern of DFIs unfeasible and forced them to raise funds at market rates. Due to a lack of long-term funds and high concentration risks, mega players such as ICICI, IDBI and IDFC became commercial banks. Attracted by high returns, commercial banks marched into finance infrastructure and long maturation projects.

However, after a decade, they experienced pressure because numerous capital intensive segments got trapped in legal and governing tangles. Lately, commercial banks are focusing more on retail financing due to exorbitant crimes and felonies in wholesale financing. This is the main reason why the government is now determined to revisit the DFI scheme—to reinforce infrastructure financing.

After many years of free-market economy, countries such as China, Brazil, Singapore, South Korea, Japan and Germany are also revisiting DFIs to face the challenges of today and tomorrow.

DFIs, also known as development banks, are not new in India. Three national-level DFIs—IFCI, ICICI and IDBI—were founded between 1948 and 1964 to offer long-term funding in the industrial segment.

This is because DFIs continue to play a vital role in economies. In the aftershock of the 2008 financial disaster, the government plans to use DFIs to revitalise the economy and sustain new endeavours. Few developed economies have solid DFIs with a special weight on encouraging green finance, modern technologies, small and medium enterprises and start-ups. For example, the UK established a Green Investment Bank in 2012. Moreover, DFIs can help battle the Covid-19 pandemic.

Although DFIs have some merit, they face many internal and external challenges. The government needs to address these on a priority basis. Controlling DFIs is important as these are public financial institutions. In India, there have been many issues with these institutions. For instance, the Housing and Urban Development Corporation (HUDCO), a national-level DFI, gave funds for an 18-hole golf course and a five-star hotel at Jaypee Greens Golf Resort in Greater Noida. In a country where billions are slum dwellers, funding a golf course should not take precedence for a DFI. HUDCO also financed high-end apartments near Delhi. Such ▶

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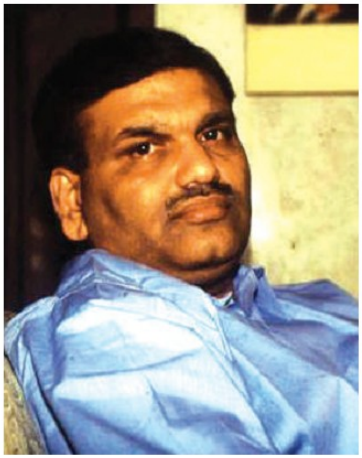
There have been issues with DFIs—HUDCO funded a golf course and hotel at Jaypee Greens Golf Resort (above) and NHB teamed up with Harshad Mehta (right) to defraud Rs 700 crore.



financing practices violate HUDCO's social obligation to meet the housing requirements of the poor and deprived sections.

Another example of poor internal control and governance system is evident in the National Housing Bank (NHB). In 1988, NHB was established as a subsidiary of RBI to control and finance housing finance entities in India. High-ranking officials of NHB collaborated with Harshad Mehta, a stockbroker, to defraud Rs 700 crore. A huge sum of NHB's money found its way into the bank account of Mehta, who then used it to manipulate shares. Therefore, DFIs should be crystal clear in their operations and responsible to the government, patrons and the public at large.

Moreover, while hastening to create new DFIs, the government should answer the following questions: Will the blueprint of a new DFI be qualitatively different than the earlier ones? Would the new DFI be transparent, inclusive and accountable? What about inspections and ways to stop corrupt and fraudulent financing practices? Would the new DFIs protect the ecology and social and human rights? Will it team up with other stakeholders such as local communities, NGOs, academia and citizens? What about policy consistency and linking with sustainable growth?

To make DFIs viable, the government should learn from past experience. If it desires that the new DFIs deliver on assurances, it should be powerfully owned and administered. Although DFIs can tap resources via financial markets and overseas organisations, the majority of its resources should be made available by the government and the RBI. Thus, the government should contribute huge sums to DFIs. Otherwise, their setting up will be fruitless.

The directive of new DFIs should be clearly voiced and the top management team should understand its goals and purposes and their role in attaining this. Their board members must be professionally knowledgeable and not political appointees. This will improve in-house governance and management practices. It is also fundamental that the board of directors and senior management has significant know-how and skill to handle a DFI. Despite DFIs being government-controlled, their senior management should have functioning independence to run routine tasks. They and the board should be honest and held responsible for any wrongdoing.

As the government is the owner and regulator of DFIs, it should form a perfect ownership policy, avoiding any conflict of interest. The new DFI should enlarge engagement with stakeholders and the public at large by going beyond a banking professional's little world.

The government must bear in mind that financing firms are plagued with issues beyond their control, as much as by their intrinsic flaws. History has shown that grand highway and pipeline plans have been endlessly held up by local protests and land acquisition issues, while telecom players have been dissatisfied by legal action over AGR and retrospective taxes. In addition, mammoth power projects have been delayed by uneven fuel distribution and poor contract implementation. The success of DFIs, therefore, depends on ironing out such critical issues and erasing hiccups in ease of doing business. ■

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